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No. 84-1538

IN THE

Supreme Court of the United States

October Term, 1984

ALEXANDRA FISHER, ET AL.,
Appellants,

v.

CITY OF BERKELEY, ET AL.,
Respondents.

On Appeal from the Supreme Court of California

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE CALIFORNIA BUILDING INDUSTRY ASSOCIATION IN SUPPORT OF APPELLANTS' JURISDICTIONAL STATEMENT

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Pursuant to Rule 36.1 of the Rules of this Court, amicus curiae California Building Industry Association hereby seeks leave to file the attached brief in support of plaintiffs and appellants, Alexandra Fisher, et al. Counsel for respondents has declined to consent to the filing of this brief.

Amicus curiae is a statewide organization of over 4,700 companies which in the aggregate produce the majority of the housing construction in the Nation's most populous state. Counsel for amicus are familiar with the opinion below and the issues and proceedings in the lower court and believe that participation as amicus herein will be of assistance to the Court.

Amicus curiae California Building Industry Association is aware that this Court's Rule 36.1 indicates that the instant motion is not favored. The motion is made and leave hereby sought to appear in the jurisdictional phase, however, because in amicus' view this Court's decision whether to grant plenary consideration herein is at least as important to the interests of California housing market participants as would be the ultimate decision on the merits by this Court.

For reasons more fully set forth in the accompanying brief, a summary affirmance or dismissal of this appeal would have an immediate and adverse impact upon the interests of amicus and other housing market participants and related industries: because this action arises by appeal rather than certiorari, any such decision would necessarily be a disposition on the merits, and afforded *stare decisis* effect. Amicus is deeply concerned that such a result would open the floodgate of experimental market regulation by municipal officers around the Nation, and particularly in certain areas of California already known for aggressive and adventurous market manipulations. For these reasons amicus respectfully requests leave to file the attached brief urging plenary consideration of this appeal.

Respectfully submitted,

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INTEREST OF AMICUS CURIAE

Amicus California Building Industry Association represents the interests of the builders of housing and commercial structures throughout the State of California. Central to the performance of that mission is the collection and dissemination of statistical and other information useful to the industry and representation of the industry's interests in various public fora including the courts.

The building industry in California experienced a downturn in rental housing "starts" in recent years despite a com-

monly acknowledged shortage of rental units. The practical experience of our members and financial industry data indicate that a major factor in this downturn is increasing distaste toward rental properties as an investment vehicle due to the proliferation of local rent controls impairing profit margins or even the capacity to service mortgage debt. As a result investors and their lenders are unwilling to risk the capital required to enter the marketplace and serve the consumers' ever-increasing demand for rental housing units.

The interest of amicus curiae herein is accordingly obvious: rent controls are not merely impeding growth, but actually imposing a *contraction* in a huge sector of the market for builders' products and services. As a result there is substantially less work for our members' employees as well as those providing goods and services to California builders. Because municipal rent controls in California are causing measurable injury to construction and related support industries, and because the situation threatens to worsen should the opinion below be accepted as the law, amicus curiae California Building Industry Association appears herein to urge this Court to accept jurisdiction of this appeal and afford plenary consideration to the issues presented thereby.

INTRODUCTION OF SUMMARY AND ARGUMENT

The lower court having totally avoided the issue of *Parker* exemption, 37 Cal.3d at 662, Appendix A at A-15, the principal issue before the Court is whether the political status of municipalities somehow affects the question whether a given course of conduct offends the policies and objectives of the Sherman Act. The opinion below apparently answers that question in the affirmative, holding that *irrespective of the economic results* a "public welfare"-directed enactment is presumptively immune from antitrust scrutiny.

The purpose of amicus herein is to demonstrate to the Court that in reality the types of harms addressed by the Sherman Act are being inflicted upon the economy by the practices of respondents and others engaging in "official" price-fixing at the municipal level. It is suggested that the existence in this particular market of demonstrable competitive harm with attendant adverse economic impacts establishes the necessity of

an *economics*-based test of whether municipal regulation "conflicts" with the Sherman Act: any other test, and particularly the test enunciated below, will certainly invite the exact "[s]erious economic dislocation which could result if cities were free to place their own parochial interests above the Nation's economic goals reflected in the antitrust laws." *City of Lafayette v. Louisiana Power and Light Co.*, 435 U.S. 389, 412-413 (1978). This is particularly the case in light of the fact that the test is in no fashion limited to rent control but extends to *all* municipal price fixing.

ARGUMENT

I

SUBSTANTIAL SECTORS OF INTERSTATE COMMERCE ARE IMPACTED BY "LOCAL" PRICE FIXING

Statistical information prepared by the Construction Industry Research Board from U.S. Department of Commerce statistical models and data shows that without question there is a close and dynamic relationship between the superficially "intrastate" construction industry in California and numerous business entities outside of the state. For example, figures compiled by the Construction Industry Research Board show that in 1983 the *multifamily* segment of residential construction alone in California generated 2.8 billion dollars and employed 67,000 construction workers *in* California, in addition to employing 98,000 *non*-construction workers, of whom 55,000 worked and resided outside the state. Of those 55,000 interstate commerce-dependent jobs, 23,400 were in manufacturing; 9,700 in services; 9,200 in wholesale and retail trade; 4,200 in communications and transport; and another 8,500 in miscellaneous roles.

A substantial portion of the multifamily units are built as rentals. In 1978, it was 82% and in 1983, the last year for which figures are available, it was 64%. But even this level of rental production is unsatisfactory.

The California Legislature has acknowledged that *something* has driven investors away from rental housing in Califor-

nia. Reciting the basis for the state's entry into the business of mortgage financing, California Health and Safety Code section 51600(d) declares in pertinent part that,

> For reasons of prudent investment policy, private lending institutions are not making mortgage financing available for rental housing developments in California because of the perceived risks such loans entail.

A 1983 study by the Bay Area Council, a business-sponsored public affairs organization in the San Francisco Bay Area, found that the "prudent investment policy" and "perceived risks" which barred private mortgage funding from rental housing were spawned primarily by rent controls. That study, entitled *Rental Housing in California: Obstacles and Opportunities* (April, 1983) (reprinted in the Appendix to the Jurisdictional Statement herein as Appendix H) included a survey of 79 lending institutions representing hundreds of billions of dollars in capital. 82% of the lenders surveyed agreed with the statement, "Rent control is a threat to any new multifamily project in California, no matter where it is located"—indicating that the pall of rent control deters infusions of capital even in California cities not presently controlling rents. Half of those responding that they had had some experience lending monies on multifamily housing within the state stated they were unlikely even to consider lending on a multifamily project in a community currently controlling rents. (Appendix H at A-148.)[1]

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1. Another market perturbation caused by rent controls is increased demand pressure upon "entry level" resale residences, as would-be renters who cannot lease scarce premises are compelled to bid against one another for ownership of the most "affordable" resale properties, artificially driving *up* those prices. This is but another example of the dynamic nature of market economics, persistently misunderstood by those who wish to view respondents' price fixing in a vacuum. It is estimated that 18-20% of the cost of housing in the San Francisco Bay Area (which includes the city of Berkeley) is the result of local regulation. Katz and Rosen, *The Effects of Land Use Controls on Housing Prices*, Working Paper 80-13, Center for Real Estate and Urban Economics, University of California, Berkeley. This, however, is no longer a situation unique to overregulation-prone California, but is spreading nationwide. *See* Report of the President's Commission on Housing (1982), Chapter 13, "Government Regulation and the Cost of Housing."

From the foregoing it should be reasonably clear that the practice of local rent control has direct and substantial impacts in the interstate finance and construction materials and support industries. It also is clear that by rendering financing difficult and investment unattractive municipal price fixing creates market entry barriers just as effectively as would a private conspiracy to exclude new competitors, and deprives consumers of the new supply and the variety of decisions and approaches stimulated by the periodic entry of new players into a market. In other words, it is suggested that not only does rent control have a "not insubstantial effect" on very significant interstate industries "as a matter of practical economics," *McLain v. Real Estate Board*, 444 U.S. 232, 246 (1980), but further that aside from the superficial effect of lowering a consumer price it creates the type of economic displacement and havoc to which the prohibitions against price fixing and market entry barriers have long been applied.

II

RESPONDENTS' ORDINANCE FACIALLY CONFLICTS WITH THE SHERMAN ACT

On its face, the respondent's ordinance requires and coerces landlords to fix rents at levels dictated by respondent Rent Stabilization Board. The Board fixes the permissible rent levels and the landlord is required to agree to accept rents at those fixed levels or face various sanctions, including imprisonment, rent withholding, and damages. Berkeley, Cal., Ordinance No. 5261-N.S., Section 15(a)(1), 15(a)(2), 15(a)(4), 15(b), 19.

An "agreement" or "combination" can be shown where one party, although he wishes not to agree, acquiesces to the coercive demands of the other. Such is often the case in vertical price maintenance arrangements. *See Federal Trade Commission v. Beech-Nut Packing Co.*, 257 U.S. 441 (1922); *United States v Bausch & Lomb Optical Co.*, 321 U.S. 707 (1944); *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1959); *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373

(1911); *Albrecht v. The Herald Company*, 390 U.S. 145, 150 n.6 (1968); *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 142 (1968).

In *Perma Life Mufflers, supra*, this Court was primarily concerned with the questions of "intra-enterprise" conspiracy between a parent corporation and its subsidiary. The Court noted, however, the alternate "combination" basis of vertical combination by coercion:

> In any event each petitioner can clearly charge [in the alternative] a combination between Midas and himself, as of the day he unwillingly complied with the restrictive franchise agreements. [392 U.S. 134, 142.]

Similarly, in *Albrecht v. The Herald Co., supra*, the Supreme Court recognized the viability of a coercive vertical combination theory:

> Petitioner's original complaint broadly asserted an illegal combination under section 1 of the Sherman Act. Under *Parke, Davis* petitioner could have claimed a combination between respondent and himself, at least as of the day he unwillingly complied with respondent's advertised price. [390 U.S. 145, 150 n. 6.]

In this context it should be noted that price-fixing is prohibited whether prices are fixed by the sellers or by some third party. *Simpson v. Union Oil Co.*, 377 U.S. 13 (1964); *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951).

The ordinance before this Court constitutes such a coerced combination, the undeniable purpose of which is restraint of freedom to set prices (rents). There are no *Noerr* ramifications here. *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961). The landlords did not petition for the privilege to be coerced from exercising their basic economic freedoms. The City has compelled them to join with it in restraint of economic freedom. This combination

places the landlord in the quandary of deciding whether to comply with municipal law or to obey federal law and withdraw from the illegal combination by refusing to obey municipal law. *See Midcal Aluminum v. Rice*, 90 Cal.App.3d 979, 982 (1979). Clearly under such circumstances the ordinance is invalid due to the preemptive weight of the Sherman Act.

III

RENT CONTROL IS INEVITABLY IN CONFLICT WITH THE POLICY AND OBJECTIVES OF THE SHERMAN ACT

Rent control is based upon the premise that "competition itself is unreasonable", *National Society of Professional Engineers v. U.S.*, 435 U.S. 679, 696 (1978). Its very purpose and objective is the abolition of the free market in favor of externally imposed controls upon the prices, and, indirectly thereby, other economic decisions by lessors of property.

The policy of the Sherman Act, on the contrary, is to promote independent pricing and decisionmaking by individual traders in the market. Obviously a conflict exists where one government encourages a market participant to retain his independent price policy and another government threatens him with imprisonment if he should refuse to yield that freedom. *See United States v. Topco Associates, Inc.*, 405 U.S. 596, 610 (1972).

A local enactment is necessarily preempted where, despite the lack of obvious or facial conflict, the local program obstructs the objectives or policies underlying federal law. *Hines v. Davidowitz*, 312 U.S. 52 (1941). For this reason it is unnecessary to find a *conspiracy* to hold preempted a price-fixing program not entitled to *Parker* exemption. *See, e.g., California Retail Liquor Dealers Assn. v. Midcal Aluminum*, 445 U.S. 97 (1980). This "obstruction" approach to preemption is thus explained in Professor Lawrence Tribe's hornbook on constitutional law:

> [S]tate and federal laws need not be contradictory on their face for the latter to supersede the former: There are more subtle forms of actual conflict. Even

> if state action does not go so far as to prohibit the very acts which the federal government requires (or vice versa), it may nonetheless be struck down if it is in "actual conflict" with the objectives that underlie federal enactments. Thus, state action must be invalidated if its effect is to discourage conduct that federal action seeks to encourage. [Tribe, *American Constitutional Law* (1978) Section 6-24.]

Examples abound outside of the antitrust context. In *Nash v. Florida Industrial Com.*, 389 U.S. 235 (1967), this Court invalidated a state unemployment compensation law which denied benefits to a petitioner who had been dismissed for filing a labor practice complaint. Under Florida law no benefits could be had where unemployment is due to a labor dispute: yet federal law prohibited *employers* from retaliatory or punitive action against employees filing labor grievances. This Court reasoned that the policy of the National Labor Relations Act, 29 U.S.C. Section 151 et seq., was to encourage the filing of valid charges, and that the state practice (although not expressly prohibited thereby) had "a direct tendency to frustrate" that purpose, and accordingly was preempted, 389 U.S. at 239. *See McCulloch v. Maryland*, 4 Wheat 316, 36, 4 L.Ed. 579, 609 (1819); *Davis v. Elmira Savings Bank*, 161 U.S. 275, 283 (1896); *Hill v. Florida*, 325 U.S. 538, 542-543 (1945); *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977).

Thus the test of preemption clearly applicable here, *independent* of the ordinance's facial creation of combinations, is that a local act is preempted where the result it obtains "stands as an obstacle to the accomplishments and execution of the full purposes and objectives" of federal law. *Jones v. Rath Packing Co.*, 430 U.S. at 526. Unquestionably if private market participants combined and acted precisely as have respondents upon rents, severe civil and criminal penalties would be brought to bear. *See Arizona v. Maricopa County Medical Soc'y.*, 457 U.S. 332 (1982). This is because the Sherman Act prohibits and deplores the surrender of the right of each trader to independently choose his prices. That policy is offended no less when a local politician manipulates the market. Accordingly, irrespective of whether a punishable "conspiracy" is present, respondents' ordinance conflicts with, and is thus preempted by, the Sherman Act.

CONCLUSION

Amicus curiae California Building Industry Association comes before the Court on behalf of an industry saturated with interstate commerce and directly affected by respondents' price-fixing practice, to respectfully urge the Court to note probable jurisdiction herein and afford this action its own plenary consideration. It is submitted that no other course of action can adequately serve the Court's traditions of orderly administration of justice and careful evolution of *stare decisis*. We are confident that this Court has the ability to resolve the difficult issues thereby presented within the boundaries of existing, cautiously evolved *stare decisis* precepts without succumbing to the temptation to "wander off the map and travel cross-country without the benefit of trail or compass," 37 Cal.3d at 633, Appendix A at A-15; and we pray the Court do so.

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